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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF M.H.1, M.H.2, M.H.3, AND M.H.4., MINOR CHILDREN, AND THEIR FATHER, THADDEUS HARRIS

THADDEUS HARRIS,

Appellant-Respondent,

vs.

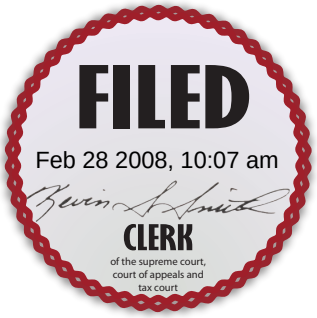
MARION COUNTY DEPARTMENT OF CHILD SERVICES,

Appellee-Petitioner,

and

CHILD ADVOCATES, INC.,

Appellee-Guardian Ad Litem.



No. 49A02-0706-JV-540

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0602-JT-7104

February 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Thaddeus H. ("Father") appeals the termination of his parental rights, in Marion Superior Court, Juvenile Division, to his four children, M.H.1, M.H.2, M.H.3, and M.H.4. We affirm.

Issues

Father raises the following restated issues on appeal:

I. Whether the juvenile court erred in denying Father's motion to continue the termination hearing; and

II. Whether the juvenile court's judgment terminating Father's parental rights to the children was supported by clear and convincing evidence.

Facts and Procedural History

The facts most favorable to the judgment reveal that on September 24, 2004, the Marion County Department of Child Services ("MCDCS") filed a petition alleging that M.H.1, M.H.2, and M.H.3 were children in need of services ("CHINS"). The CHINS petition alleged that the children had been abandoned in a vehicle by their mother, Felisha B. ("Mother"), and that Father, whose whereabouts were unknown, had not "successfully demonstrated to the [MCDCS] the ability or willingness to appropriately parent the children." Ex. 1, p.3.

On January 25, 2005, a default hearing was held on the CHINS petition as to Father.[1] The juvenile court found M.H.1, M.H.2, and M.H.3 to be CHINS, removed them from the care and custody of Father pursuant to a dispositional order, and made the children wards of the MCDCS. Sometime in early February 2005, Father contacted MCDCS caseworker Charles Henderson, who informed Father of a hearing to be held on February 24.

Father appeared at the CHINS hearing on February 24, 2005, after which the juvenile court issued a parental participation decree. The parental participation decree ordered Father to, among other things: (1) maintain contact with the MCDCS caseworker and inform him of any changes in address or telephone number; (2) obtain suitable housing; (3) secure and maintain a legal and stable source of income; (4) exercise visitation on a regular and consistent basis; and, (5) participate in and successfully complete all court-ordered services, including parenting classes, drug and alcohol assessment and treatment, random drug screens, family counseling and home-based counseling. The children were subsequently placed in relative care with their maternal grandmother.

Henderson subsequently made a visitation referral for Father. At first, Father exercised weekly visitation, but after a month or so, Father's visitations became sporadic and eventually ceased. Henderson also made two separate referrals for Father to complete a parenting assessment, which was a requirement under the participation decree and a

[1] The juvenile court reset the hearing for Mother, who was incarcerated in the Madison County Jail, and who had not been transported for the hearing.

prerequisite for further necessary referrals. Father never participated in a parenting assessment.

On June 26, 2005, Mother gave birth to M.H.4, and on June 29, 2005, the MCDCS filed a CHINS petition for M.H.4, alleging that M.H.4 was endangered as a result of Mother having older children who were wards of the State as well as her failure to participate in services. The CHINS petition also alleged that Father had not demonstrated his ability or willingness to appropriately parent the child, had not established paternity for M.H.4 and was currently incarcerated in the Marion County Jail. On June 29, 2005, a hearing on the CHINS petition was held and Mother and Father were both present. Father admitted to the allegations of the CHINS petition. M.H.4 was declared a CHINS, made a ward of the MCDCS, and a dispositional hearing was set for August 8, 2005. M.H.4 was subsequently placed in relative care with a maternal cousin.

At the dispositional hearing, the juvenile court ordered that M.H.4's case be consolidated with the siblings' case, that M.H.4 be removed from the care of Mother and Father, and that the parental participation plan be made a part of the order. The parental participation plan pertaining to M.H.4, which was nearly identical to the earlier one involving Father's three older children, required Father to maintain contact with the caseworker, to obtain suitable housing and employment, to regularly exercise visitation with M.H.4, and to participate in court-ordered services.

On February 21, 2006, the MCDCS filed a petition for the involuntary termination of Father's parental rights to all four children. A fact-finding hearing was held on May 25, 2007. Father was not present at the hearing as a result of his incarceration. However, Father

was represented by counsel. On May 29, 2007, the juvenile court issued its judgment terminating Father's and Mother's parental rights to the children.[2] This appeal ensued.

Discussion and Decision

I. Motion to Dismiss

Father first asserts that the juvenile court committed reversible error when it denied his motion to continue the termination hearing. Specifically, Father argues that "denial of the right to be present and assist his counsel in presenting a case to defend against termination of his parental rights was a denial of due process and an opportunity to be heard." Appellant's Br. at 4.

> The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. The nature of the process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure.

In re C.C., 788 N.E.2d 847, 852 (Ind. Ct. App. 2003) (citations omitted), *trans. denied*. Thus, we must first identify the precise nature of the private interest threatened by the State before we can properly evaluate the adequacy of the State's process. *Id.*

Here, the private interests implicated in this case are substantial. In particular, the action concerns Father's interest in the care, custody and control of his children, which has been repeatedly recognized as one of the most valued relationships in our society. *Id.* Moreover, it is well settled that the right to raise one's child is an "essential, basic right that

[2] Mother signed consents for adoption for all four children and is not a party to this appeal.

is more precious than property rights." *Id.* (citing *In re Paternity of M.G.S.*, 756 N.E.2d 990, 1005 (Ind. Ct. App. 2001), *trans. denied* (2002)). Thus, Father's interest in the accuracy and fairness of the proceeding is a "commanding one." *C.C.*, 788 N.E.2d at 852.

The second factor requires an assessment of the risk of error created by the challenged procedure: namely, proceeding without Father's physical presence. *Id.* We observe that Indiana Code Section 31-35-2-6.5(e) states that the court shall provide a party with an "opportunity to be heard … at the hearing." However, this statutory provision does not create a constitutional right for Father to be physically present at the termination hearing. *See In re E.E.*, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006) (stating parent does not have a constitutional right to be present at a termination hearing), *trans. denied*; *In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000) (stating incarcerated parent has no absolute right to be physically present at the termination hearing). Here, Father was zealously represented by counsel throughout the entire termination hearing. Father's counsel was provided with the opportunity to cross-examine the State's witnesses, and in fact did so, as well as the opportunity to introduce evidence in defense of the action. Under these circumstances, we have recognized that the risk of an inaccurate result decreases significantly. *See id.* Additionally, Father fails to allege any specific prejudice that resulted from his absence. Based on the foregoing, we conclude that the risk of error caused by the juvenile court's denial of counsel's motion to continue was minimal.

The final factor to consider is the countervailing government interest. The State's *parens patriae* interest in protecting the welfare of the children is significant. "Although the State does not gain when it separates children from the custody of fit parents, the State has a

compelling interest in protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse, or abandonment are at issue." *Tillotson v. Clay County Dep't of Family & Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002) (quotation omitted), *trans. denied* (2003).

In the present case, the MCDCS filed CHINS petitions on September 24, 2004, for M.H.1, M.H.2, and M.H.3., and on June 29, 2005, for M.H.4. The three older children were removed pursuant to dispositional decree on January 25, 2005, and M.H.4 was removed from Father's care on August 9, 2005. The final termination hearing was held on May 25, 2007. Thus, the three older children had been removed from Father's care and were wards of the State for well over two years. M.H.4 had been removed from Father's care and had been a ward of the State for almost two years. We have previously recognized that delays in the adjudication of a case "impose significant costs upon the functions of government as well as an intangible cost to the lives of the children involved." *Id.*

After balancing the substantial interest of Father with that of the State, and in light of the minimal risk of error created by the challenged procedure, we conclude that, under the facts of this case, the trial court did not violate Father's constitutional right to due process of law when it denied counsel's motion to continue and proceeded with the termination hearing in Father's absence.

II. Clear and Convincing Evidence

Next, Father argues that the juvenile court's order terminating his parental rights was not supported by clear and convincing evidence and was therefore clearly erroneous.

This court has long had a highly deferential standard of review in cases concerning the

termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.*

Here, the juvenile court made specific findings and conclusions thereon in its order terminating Father's parental rights. Where the juvenile court enters specific findings of fact, we must first determine whether the evidence supports the findings. *Id.* Then, we determine whether the findings support the judgment. *Id.* We will not set aside the trial court's judgment terminating parental rights unless it is clearly erroneous. *Id*. at 265. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *Id*. A judgment is clearly erroneous only if the findings of fact do not support the trial court's conclusions thereon, or the conclusions thereon do not support the judgment. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, these parental interests are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *Id.* Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *K.S.*, 750 N.E.2d at 836.

In order to terminate a parent-child relationship, the State is required to allege and

prove that:

> (A) [o]ne (1) of the following exists:
> (i) the child has been removed form the parent for at least six (6) months under a dispositional decree;
> ….
> (B) there is a reasonable probability that:
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
> (C) termination is in the best interests of the child; and
> (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b). The State must establish each of these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Works*, 592 N.E.2d 1232, 1234 (Ind. 1992).

Father does not challenge the juvenile court's findings that the children had been removed for more than six months pursuant to a dispositional decree, that termination of the parent-child relationship is in the children's best interests, or that the MCDCS has a satisfactory plan for the care and treatment of the children. Rather, Father asserts that the MCDCS failed to prove by clear and convincing evidence that the conditions that resulted in the children's removal and continued placement outside Father's care would not be remedied, and that continuation of the parent-child relationship poses a threat to the children's well being.

Initially, we point out that that Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive. It therefore requires the juvenile court to find only one of the two requirements of subsection (B) by clear and convincing evidence. *See In re L.S.*, 717 N.E.2d

204, 209 (Ind. Ct. App. 1999), *trans. denied* (2000), *cert. denied* (2002). We will first review whether the juvenile court's determination that there was a reasonable probability that the conditions that resulted in the children's removal from Father's care would not be remedied in clearly erroneous.

Father argues that it "was Mother's abandonment of her children in an automobile[] that lead to the removal of the children[.]" Appellant's Br. at 12. He further states that he only had approximately three (3) months before his release from prison, and "a relatively short continuance would have afforded him [an] opportunity to complete services and demonstrate his willingness and ability to parent" the children and provide them with a "stable and safe environment[.]" *Id.*

In making his claim, Father directs our attention to *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied.* The facts of *Rowlett*, however, are easily distinguishable from the facts in the present case.

In *Rowlett*, we recognized that the father had "made a good-faith effort to better himself as a person and a parent" by availing himself of every opportunity for treatment. *Id.* at 623. In fact, Rowlett, who had been incarcerated throughout the entire termination proceedings and for all but two months of the CHINS proceedings, participated in a Therapeutic Community while in prison, and, as of two weeks prior to the termination hearing, had participated in nearly 1100 hours of individual and group services, including services in encounters, anger management and impulse control, parenting skills, domestic violence, self-esteem, self-help, and substance abuse classes. Rowlett had also earned twelve hours of college credit and was enrolled in eighteen additional hours. Moreover, at the

termination hearing, Rowlett readily admitted to his criminal history and prior drug use, testified that he never wanted to use drugs again because they had ruined his life, and stated that he planned on continuing counseling and other services to help maintain his sobriety. Lastly, we note that Rowlett had maintained contact with his children while incarcerated through telephone calls and by writing letters.

In contrast to the facts of *Rowlett*, in the present case, Father was given the opportunity to exercise regular visitation with the children, as well as participate in a parenting assessment during the CHINS case. Unfortunately, the record reveals that Father only initially participated in visitation, and after approximately one month, his visitation with the children became sporadic, eventually ceasing altogether. Additionally, Father never chose to participate in a parenting assessment prior to his incarceration, despite two separate referrals. There is also no evidence that Father ever participated in any self improvement or parenting services while in prison, or that he made any attempt to maintain regular contact with the family case worker or with the children during his incarceration. Based on the foregoing, we hold that *Rowlett* is not applicable to the present case.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* Pursuant to this rule, courts have properly considered evidence

of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. The trial court may also properly consider the parent's response to services offered through the Department of Child Services as evidence of whether the conditions will be remedied. *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*.

In its termination order, the juvenile court made the following pertinent findings:

> 6. Father was court ordered to participate in services toward reunification with his children. Level one services included maintaining weekly contact with the MCDCS family case manager, complete a parenting assessment, maintain safe and suitable housing, obtain a legal and stable source of income, establish paternity and consistently visit the children.
> 7. Father admitted paternity and for the first couple of months, visited the children prior to stopping. Father has not seen the children for over one year.
> 8. Two parenting assessment referrals were made but never attended by Father.
> 9. Sporadic contact existed between Father and the family case manager.
> 10. During this period, Father was in and out of various residences, and in and out of jail. He was arrested on a probation violation and is currently incarcerated with an anticipated out-date of August of 2007.
> 11. Father has an extensive criminal history including convictions for Theft, Robbery, Criminal Confinement and four Battery convictions.
> 12. The ability of Father to obtain and maintain a legal source of income is unknown.
> 13. There is a reasonable probability that the conditions that resulted in the children's removal and placement outside the home will not be remedied. Father has not even completed a parenting assessment within the twenty-seven month period he has been involved in the CHINS proceedings.
> 14. By Father's pattern of criminal conduct, and his pattern of non-conduct in showing an ability and willingness to parent, additional time to complete services would not be in the best interests of the children.

Appellant's Br. at 20-21.

There is ample evidence in the record to support the juvenile court's findings. Additionally, while Father is correct that the MCDCS initially became involved with the family because Mother abandoned the children, the CHINS petition clearly states that the children were removed from Father's care, in part, because he had failed to successfully demonstrate to the MCDCS the ability or willingness to appropriately care for the children. Father subsequently admitted to this allegation. However, at the time of the termination hearing approximately two years later, those conditions still had not changed and Father was back in prison.

Based on the foregoing, we find that the evidence supports the juvenile court's conclusion that there is a reasonable probability that the conditions leading to the removal and continued placement of the children outside of Father's care would not be remedied.[3] "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *Lang*, 861 N.E.2d 372. Moreover, it would be unfair to ask the children to continue to wait until Father is able to get, and benefit from, the help that he needs to appropriately care for the children. Approximately two years without improvement is long enough. *See In re Campbell*, 534

[3] Having determined that the juvenile court's conclusions regarding the remedy of conditions is not clearly erroneous, we need not address the issue of whether the MCDCS failed to prove that continuation of the parent-child relationship poses a threat to the children's well-being. *See L.S.*, 717 N.E.2d at 209 (explaining that Ind. Code § 31-35-2-4(b)(2)(B) is written in the disjunctive).

N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating the court was unwilling to put child "on a shelf" until her parents were capable of caring for her—two years was long enough).

The juvenile court's judgment terminating Father's parental rights to M.H.1, M.H.2, M.H.3, and M.H.4 is supported by clear and convincing evidence. We therefore affirm.

Affirmed.

BAILEY, J., and NAJAM, J., concur.